

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision :25-7-1996

CRIMINAL APPEAL NO. 968 OF 1984

For Approval and Signature

THE HON'BLE Mr. JUSTICE J.M.PANCHAL

AND

THE HON'BLE Mr. JUSTICE M.H.KADRI

The State of Gujarat.....Appellant.

Vs.

1.Jadeja Ishwarsinh Kekubha and ors.....Respondents.

1. Whether Reporters of Local Papers may be allowed  
to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy  
of judgment ?

4. Whether this case involves a substantial question  
of law as to the interpretation of the  
Constitution of India,1950 or any order made  
thereunder ?

5. Whether it is to be circulated to the Civil Judge  
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Mr. S.R.Divetia, A.P.P. for the appellant.

Mr. C.H.Vora, Advocate for the respondents.

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( July 25, 1996)

ORAL JUDGMENT :- (Per : Kadri,J.) :-

The appellant-State of Gujarat, by this appeal under section 378 of the Code of Criminal Procedure, 1973, has challenged legality and validity of the judgment and order dated February 8, 1984, passed by the learned Sessions Judge, Kutch at Bhuj, in Sessions Case no. 34 of 1983, wherein the respondents-accused were acquitted of the charges framed under section 302 read with section 34 of the Indian Penal Code and the respondent no. 1 was also acquitted of the offence punishable under section 25(1)(c) of the Arms Act.

2. The prosecution case is summarised as under :-

The complainant Vikramsinh along with his elder brother Balvantsinh and younger brother Ghanshyamsinh was residing in village Nani Khedoi. On 12.1.1983 at about 10.00 A.M. when he was going to his Wadi, he spotted a Fiat Car which was being driven by accused no. 4. He also saw accused nos. 1 to 3 sitting in the Car. When he reached his Wadi, he received a telephonic message from his son Mahesh that Balvantsinh was lying in an injured condition near temple of Hanumanji. Meanwhile, witness Jambha came at Wadi of Vikramsinh and informed him that while Balvantsinh was coming on scooter from Moti Khedoi, he was knocked down by Fiat Car being driven by the accused no. 4 and thereafter all accused had come out of the Car and accused no. 1 had fired shots from revolver, as a result of which Balvantsinh had received injuries and was lying near Wadi of Satubha. On receiving information, Vikramsinh went to inform his brother Ghanshyamsinh and along with his brother went to the place where his elder brother Balvantsinh was lying. When they reached at the spot, they were informed that his elder brother Balvantsinh was taken to Anjar Hospital. At the place of incident, scooter of his brother Balvantsinh was lying in damaged condition and pool of blood was found near the scooter. On way to Anjar, witness Vikramsinh found that one Fiat Car was lying which belonged to accused no. 4. When they reached at the Hospital at Anjar, they found that Balvantsinh had bandages over his head as well as abdominal portion and was under treatment. It is alleged that when witness Jambha came to inform about injuries sustained by Balvantsinh, he had narrated the whole incident to

Vikramsinh. At Anjar Hospital, persons of village Khedoi, namely, Narubha, Jashubha Velubha and others were present. In the meantime, Police Sub Inspector Mr. Patel arrived at the Hospital and, therefore, Vikramsinh lodged his complaint before P.S.I. Mr. Patel, who at the relevant time was discharging his duties at Anjar Police Station. After lodging the complaint by Vikramsinh, P.S.I. Mr. Patel sprang into action and started investigation.

3. As condition of Balvantsinh was deteriorating, he was shifted to Bhuj Hospital where he was treated by Dr. Buch and during the treatment he succumbed to the injuries. After drawing inquest panchnama, Dr. Buch performed postmortem of the dead body of the deceased. P.S.I. Mr. Patel after completing the investigation, submitted chargesheet against four accused for the offences as stated above. As the offence under section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the case was accordingly committed to the Court of Sessions at Bhuj, which came to be numbered as Sessions Case no.34/83.

4. Charge at Exh.1 was framed against the accused by the learned Sessions Judge, Kutch at Bhuj, which was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried.

5. The prosecution, in order to prove its case examined the following witnesses :-

- (1) Mukesh Labhshanker Shukla, PW.1, Exh.11
- (2) Vikramsinh Chandubha. PW.2, Exh.13
- (3) Jamubha Himatsinh, PW.3, Exh.14
- (4) Khima Vira , PW.4, Exh.15
- (5) Vasram Devraj, PW 5, Exh.16
- (6) Ghanshyamsinh Chandubha, PW.6, Exh.17
- (7) Pravinsinh Narubha, PW.7, Exh.18
- (8) Dr.M.D.Buch, Medical Officer, P.W.8, Exh.27
- (9) Dr.M.A.Sanghavi, Medical Officer, PW.9, Exh.30
- (10) Narpatsinh Velubha, PW.10, Exh.32
- (11) Narpatsinh Vijaysinh, PW.11, Exh.33
- (12) Jasubha Jevalji, PW.12, Exh.34
- (13) Narubha Mohabatsinh, PW.13, Exh.35
- (14) Muljibhai Punaji Pamar, PW.14, Exh.36
- (15) Chhatrasinh Fatebsinh Jadeja, PW.15, Exh.38
- (16) P.S.I. Mr. N.K.Patel, PW.16, Exh.46.

The prosecution also relied

evidence, which mainly consists of complaint of Vikramsinh Mark M/1, panchnama of scene of offence, postmortem notes exh.29, map of scene of offence and the

report of Forensic Science Laboratory ("F.S.L." for short)

6. The learned Sessions Judge, after appreciating the evidence of prosecution, acquitted the respondents-accused mainly on the following grounds:

- (i) P.W.2- Vikramsinh Chandubha, who had lodged the complaint before P.S.I. Mr. Patel, had not stated in his complaint that P.W.3 Jambha had come to his Wadi and had narrated the incident in detail. Therefore, evidence of eye witness Jambha is highly doubtful. If, in fact, Jambha had narrated the incident in detail to P.W.2 Vikramsinh, then he would have certainly stated in his complaint about the manner in which the incident had taken place and also the involvement of the accused persons.
- (ii) P.W.3- Jambha was got-up witness, just to involve the accused persons with the incident in question.
- (iii) That the evidence of Jambha was contrary to the medical evidence of Dr. Buch, who had performed the postmortem of the dead body of deceased Balvantsinh inasmuch as according to witness Jambha, accused no.1 had fired two gun shots with revolver on the head of the deceased and one shot on the abdominal part of the deceased from a distance of 1 to 1 1/2 feet; whereas according to the evidence of Dr. Buch, only one shot was fired on head of the deceased and the gun shots were fired at a distance of not less than 20 ft.
- (iv) The conduct of Jambha was highly unnatural because he did not try to rescue the deceased nor raised any shouts nor had informed his family members and other persons about the incident.
- (v) P.W.2-Vikramsinh had admitted in his evidence that his son Mahesh had informed him on Phone that the deceased Balvantsinh was lying near the Wadi of Satubha and in spite of this fact, he did not inform the police even though phone facilities were available at his Wadi and also at his residence.
- (vi) The F.I.R. i.e. the complaint was lodged at Anjar Police Station after due deliberation and consultation with other village people and close relatives of witness Vikramsinh.
- (vii) The bullet which was recovered from the abdominal part of body of the deceased, was of Bore

- 455-calibre; whereas the alleged revolver recovered from the accused no.1 was of 0.38 calibre and in view of opinion of Ballistic Expert, bullet which was recovered from the dead body of the deceased could not have been fired from the revolver produced by the accused no.1.
- (viii) The incident in question had taken place near Wadi of Satubha which was surrounded by residential houses as shown in the map prepared by the Circle Inspector and inspite of this fact, other independent witnesses were not examined by the prosecution.
- (ix) The motive alleged for the murder of the deceased

evidence of the prosecution witnesses.

On the above main grounds, the learned Sessions Judge acquitted the accused of the charges framed against them, which has given rise to the present appeal.

7. The learned Additional Public Prosecutor Mr. S.R.Divetia has strenuously urged before us that the learned Sessions Judge has erred in not placing reliance on the evidence of eye witness Jambha, who had seen the entire incident. The learned Additional Public Prosecutor has taken us through the evidence of sole eye witness Jambha, who has been examined as P.W.3 at Exh.14. The learned Additional Public Prosecutor also relied on the evidence of the complainant Vikramsinh. If the evidence of these witnesses is compared with the complaint lodged by Vikramsinh before P.S.I. Mr. Patel, it transpires that in the complaint Vikramsinh has not stated that Jambha had come to his Wadi and informed that deceased Balvantsinh was knocked down by Fiat Car driven by accused no.4 and after the deceased fell down from his scooter, all the four accused alighted from their Car and assaulted the deceased. That accused no.1 had taken out revolver and fired two shots on the head of the deceased and one shot on the abdominal part from a very close range. The complaint lodged by Vikramsinh does not bear all these details. On the contrary, as the evidence of prosecution discloses that Vikramsinh had informed his brother Ghanshyamsinh that Mahesh who was son of Vikramsinh, had phoned him and had informed that deceased Balvantsinh was lying in injured condition near the Wadi of Satubha. If we closely scrutinise the evidence of Vikramsinh and Jambha, it becomes clear that they are trying to suppress genesis of the prosecution story and they have tried to falsely implicate the respondents. The complainant Vikramsinh is not a truthful witness

because he had gone to the extent of deposing before the Court that he had not lodged complaint before P.S.I. Mr. Patel and his complaint was not taken down by P.S.I. Mr. Patel as narrated by him. P.S.I. Mr. Patel has deposed that the complaint lodged by Vikramsinh which is produced at Mark M/1 was noted down as per the say of the complainant Vikramsinh and after reading over the complaint to him, Vikramsinh had signed it and copy of the complaint was also given to him. This fact belies the version of Vikramsinh that P.S.I. Patel had not taken the complaint as narrated by him. The complaint mark M/1 of Vikramsinh totally dislodges presence of Jambha at the place of the incident. It would not be out of place to state that Jambha is a got-up witness and has come to help the prosecution with a view to becoming sole eye witness.

8. The complaint lodged by Vikramsinh mark M/1 shows that Mahesh, son of the complainant had informed him on phone that the deceased had sustained injuries and was lying near Hanumanji Temple. The complaint does not show that Jambha had informed the complainant that four accused had assaulted the deceased and as a result of that assault, he was lying in an injured condition at the scene of offence. The complaint on the contrary shows that when the complainant reached Anjar Hospital, Pravinsinh Narubha, Jambha Himatsinh and Narpatsinh Velubha informed him that the deceased was knocked down by Fiat Car which was driven by accused no.4 and after the deceased fell down, accused no.1 took out his revolver and had fired 3 shots on the deceased. It is pertinent to note the fact that witnesses Pravinsinh Narubha, Jambha Himatsinh and Narpatsinh Velubhai had informed him about the assault by four accused on the deceased is not stated by Vikramsinh in his sworn testimony before Court. The complaint does not show that Jambha had come to the Wadi of the complainant and had narrated the manner in which the incident had taken place. The omission of fact in the complaint that Jambha had come to the Wadi and informed the complainant about the assault by the accused persons completely dislodges the prosecution case which was for the first time introduced during the trial.

9. According to the evidence of witness Jambha accused no.1 had fired two revolver shots on the head of the deceased. This version of the eye witness is completely belied by the evidence of Dr.Buch, who had performed autopsy on the dead body of the deceased. According to the evidence of Dr. Buch, there was only one bullet injury which was found on the skull of the

deceased. The evidence of Jambha is also highly doubtful because according to him, accused no.1 had fired revolver shots on the abdominal part of the deceased at a distance of 1 or 1 1/2 ft. The evidence of Dr.Buch who performed the autopsy, is contrary to the oral evidence of witness Jambha. The medical evidence on record shows that if fire-arm is fired close to the skin surrounding the wound will be scorched and blackened and also tattooed with particles of unconsumed gun powder. Dr. Buch in his evidence emphatically deposed that looking to the gun shot injury it can be safely opined that revolver must have been fired from a distance not less than 20 feet and the skin surrounding wound was neither scorched nor blackened. Therefore, the medical evidence completely belies the evidence of Jambha that the accused no.1 had fired three shots at a close range. The fire arm i.e. revolver which was discovered during the investigation, is of 0.38 calibre revolver and cartridge which was recovered from the dead body of the deceased was 0.4555 calibre. According to the opinion of Ballasti Expert, the said cartridge of 0.4555 calibre could not have been fired from 0.38 calibre revolver. It may also be stated that discovery of muddamal revolver from the accused no.1 is not proved by the prosecution beyond doubt. Even otherwise also muddamal revolver does not involve accused no.1 with the commission of crime.

10. The motive as alleged by the prosecution is also not proved by the evidence of witnesses who were examined during the trial. In our opinion, the reasons given and conclusions arrived at by the learned Sessions Judge in acquitting the accused persons from the charges framed against them, are quite just, proper and reasonable and we are in entire agreement with those conclusions.

11. This is an acquittal appeal in which court should be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such as case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in

the cases of (1) Girija Nandini Devi & Ors. vs. Bijendra Narain Chaudhary, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka vs. Hema Reddy and anothers, A.I.R. 1981 Sc 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned Trial Judge in the impugned judgment.

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